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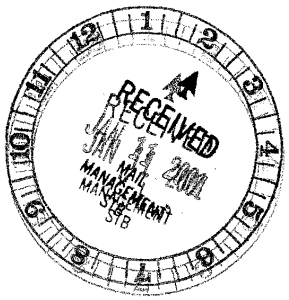
UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD



EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

REBUTTAL COMMENTS OF EDISON ELECTRIC INSTITUTE

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REBUTTAL COMMENTS OF EDISON ELECTRIC INSTITUTE

Edison Electric Institute ("EEI") hereby submits its Rebuttal Comments to the Reply Comments of various parties, including those of the U.S. Department of Transportation ("DOT"), Association of American Railroads ("AAR"), Burlington Northern-Santa Fe Railway Company ("BNSF"), Canadian National Railway Company ("CN"), Canadian Pacific Railway Company ("CP"), CSX Transportation, Inc. ("CSX"), Norfolk Southern Railway Company ("NS"), and Union Pacific Railroad Company ("UP"). We do not submit rebuttal to most of the Reply Comments of parties EEI supports, in the interests of brevity, but do refer the Board to the Reply Comments of the National Industrial Transportation League ("NIT League") as the best recent evidence of shipper rate increases as a result of mergers, and to the Reply Comments of a few other parties who made points that are germane to EEI's concerns. We do provide references to Reply Comments of parties whose positions EEI supports so that the Board will know that EEI does support them.

EEI is responding to the most important points made by other parties, but is not responding to every point with which EEI disagrees, in the interest of brevity. EEI is confident other parties will rebut all such points.

Argument

I.

THE BOARD CAN ADOPT ANY PROPOSAL THAT IS THE "LOGICAL OUTGROWTH" OF ITS OWN PROPOSALS, AND IS NOT BARRED FROM ADOPTING SHIPPER PROPOSALS BECAUSE OF RAILROAD ASSERTIONS THAT THEY AMOUNT TO "RESTRUCTURING" OF THE RAILROAD INDUSTRY.

The railroads argue that the Board cannot adopt any proposal that the Board did not itself propose in the NPR[1]. The railroads are wrong. Under the Administrative Procedure Act ("APA"), the Board can adopt any proposal that is the "logical outgrowth" of the proposals the Board itself made in the NPR:

> [An] agency must have authority to promulgate a final rule that differs in some particulars from its proposed rule. Otherwise the process might never end. If the final rule deviates too sharply from the proposal, however, affected parties will have been deprived of notice and an opportunity to respond to the rule. Accordingly, a final rule which departs from a proposed rule must be a "logical outgrowth" of the proposed rule. The essential inquiry focuses on whether interested parties reasonably could have anticipated the final rulemaking from [the proposed rule].

NRDC v. EPA, 863 F.2d 1420, 1429 (9th Cir. 1988) (internal citations omitted) (emphasis added); *see also American Waterworks Assoc. v. EPA*, 40 F.3d 1266, 1274 (D.C.Cir. 1994) (also applying "logical outgrowth" test); *Anne Arundel Cty. v. EPA*, 963 F.2d 412, 418 (D.C.Cir. 1992) (same). *See also Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1058-59 (D.C. Cir. 2000):

> [N]otice requirements do not require that the final rule be an exact replication of the proposed rule. If that rigidity were required, the purpose of notice and comment -- to allow an agency to reconsider, and sometimes change, its proposal based on the comments of affected persons -- would be undermined. Agencies would either refuse to make

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[1] *E.g.*, BNSF Reply Comments at 17 n.14; NS Reply Comments at 10 n.3.

> changes in response to comments or be forced into perpetual cycles of new notice and comment periods. Recognizing this, we hold that notice and comment requirements are met when an agency issues rules "that do not exactly coincide with the proposed rule so long as the final rule is the "logical outgrowth" of the proposed rule." "The key focus is whether the purposes of notice and comment have been adequately served . . . [A] final rule will be deemed to be the logical outgrowth of a proposed rule if a new round of notice and comment would not provide commentators with `their first occasion to offer new and different criticisms which the agency might find convincing.'" (internal citations omitted).

Appalachian Power Co. v. EPA, 135 F.3d 791, 804 n.22 (D.C. Cir. 1998) ("[I]t would be unproductive to insist that an agency 'learn from the comments on its proposals only at the peril of starting a new procedural round of commentary'" (internal citations omitted)).

EEI's proposals for such things as service guarantees, protection for "3 to 2" shippers, adoption of FERC's methods of enhancing competition and protecting customers from rate increases as a result of mergers, and the like, are all the "logical outgrowth" of the Board's own proposals, and thus could be adopted by the Board without further proceedings.

The railroads also argue that the shippers' proposals largely amount to "restructuring" of the railroad industry.[2] The railroads are wrong in making this assertion; **it is the railroads themselves who have been busily restructuring their own industry, through mergers, acquisitions, control transactions, abandonments, grants of trackage rights, and other means, for many years**. This has been particularly true over the last decade. For proof of this, we rely on a source AAR cannot

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[2] *E.g.*, AAR Reply Comments at 3-8; *see also* BNSF Reply Comments at 17-19; CSX Reply Comments at 35-40; NS Reply Comments at 20-21.

dispute: its prior Chairman, and current Chairman of NS, Mr. David R. Goode, who testified that it was the **railroads'** transactions of the last several years that amounted to "restructuring."[3]

The shippers' proposals, and the Board's, are responsive to the restructuring that the railroads have created, especially over the last 6 years. The September 2000 letter to Senators McCain and Hollings from over 280 Chief Executive Officers of shippers and shipper organizations is the best evidence of that. There were many shippers who were not opposed to the railroads' actions until the recent round of mergers, starting with BN/SF in 1994-95. Shipper opposition rose dramatically in response to the UP/SP merger of 1995-96, as the Board well knows.

Other agencies have recognized that, in order to combat the anti-competitive or even simply potentially anti-competitive, effects of mergers, they needed to promote and enhance competition in response. Not only has FERC done so, as EEI showed in its Reply Comments, as a precondition of electric utility mergers, but so have other agencies. For example, FTC has done so in such instances as the AOL/Time Warner merger.

Thus, it is not the shippers who are seeking to "restructure" the railroad industry. The railroads have done that themselves, with the approval of the ICC or this Board in most instances. Most of the shippers' proposals to restore or enhance competition are simply a **reaction to** that restructuring, and were not even proposed before 1995. (As the Board knows, prior to the UP/SP

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[3] In a Verified Statement submitted on February 29, 2000 (at 5) in Ex Parte No. 582, Mr. Goode testified:

> I have to admit that the restructuring of the U.S. rail industry, particularly during the large consolidations of the last decade, has been disruptive to the industry and to our customers. For a variety of reasons, which include the strains on physical infrastructure from growing traffic volumes and the size and complexity of recent major rail consolidations, recent transactions, have been more difficult and time-consuming to implement than prior ones.

merger, shipper proposals were more modest, and not labeled as "restructuring"even by the railroads). It is clear that the Board has the authority, as a condition to any future merger, to require that pro-competitive conditions be adopted, as we now show.[4]

II.

THE BOARD HAS AUTHORITY TO REQUIRE ENHANCEMENT OF COMPETITION.

The railroads are simply wrong in asserting that there is no authority for the Board's proposal that the effect of mergers of Class I railroads must be to enhance competition. First, of course, the Board has broad power to adopt conditions on its approval of railroad mergers. All parties acknowledge that the Board has such broad power, and that the statute requires the Board to consider the effect on competition of the proposed transaction. 49 U.S.C. §11324.

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[4] The STB has authority to do so in merger transactions still pending before the Board, and in those transactions still subject to the Board's authority, notwithstanding UP's objections. *Compare* UP Reply Comments at 4-7. The Board itself has asserted such authority in imposing work-rule and other collective-bargaining changes as much as 20 years after approval of a rail merger. It can hardly be contended, therefore, that a merger such as *UP/SP* or the *Conrail* proceeding is not still pending before the Board and is subject to the imposition of additional conditions or changes in any event. Moreover, the Board imposed its new rules on market dominance on UP in the *FMC* proceeding notwithstanding similar concerns from UP about "retroactivity." The law is hardly as clear as UP asserts, and the Board got the law right in the *FMC* proceeding. (Surprisingly, despite being the defendant in that proceeding, UP failed to make reference to it in its Reply Comments.) To take one example, if the Second Circuit were to hold that the Board erred in failing to adopt protections for shippers from rate increases as a result of the *Conrail* proceeding, that would clearly not be "retroactive," or else UP's argument would amount to a holding that the Second Circuit could not provide relief to shippers should NIT League's petition for review prevail there. Yet, if the Board were persuaded to adopt such protections in rail mergers, including in the *Conrail* proceeding, now, UP would argue that that was impermissible "retroactivity." It cannot be that the Board is incapable now of doing something that a court might order in the future, on the grounds of alleged "retroactivity." The correct result is that the Board has broad authority to impose conditions on mergers to protect the public interest, even to prohibit the filing of applications for merger authority as the D. C. Circuit has now held in the "merger moratorium" case, provided that the Board does not interfere with the "settled expectations" of the applicants, as the case law relied on by the Board in the *FMC* proceeding makes clear.

Second, as EEI pointed out in its Reply Comments, the railroads themselves are relying primarily on the Rail Transportation Policy in their court challenge to the Board's decision in Ex Parte No. 627 to eliminate product and geographic competition in railroad rate proceedings. That policy requires that competition rather than regulation be the prevailing policy with respect to the railroad industry, "to the maximum extent possible." 49 U.S.C.§ 10101. Read together with § 11324, these provisions clearly provide the Board with the requisite authority to require that competition be enhanced by any future merger that the Board may approve.[5]

Third, other agencies with less authority than the Board has have adopted requirements that mergers in network industries enhance competition, as we showed *supra*. The Board should not fear doing the same to the railroad industry, for the other network industries have prospered under such conditions. Competition is the norm, not the exception, in American industry, and is the core principle on which our economy is based.

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[5] Many other parties agree with EEI that the Board has the authority to require that competition is consistent with the Staggers Rail Act. *See, e.g.,* Reply Comments of Dow Chemical Co. at 12-13; Reply Comments of the Wheat, Barley and Grain Commissions at 4-5; *see also* Reply Comments of the Committee to Improve American Coal Transportation ("IMPACT") at 15-24 (noting that "The Staggers Act's regulatory reforms depend on 'effective competition among rail carriers,'" *citing Santa Fe Southern Pacific Corp. - Control - Southern Pacific Transportation Co.*, 2 I.C.C.2d 709, 722 (1986)). Other parties agree with EEI that the Board has authority under 49 U.S.C. § 11324(c) to condition approval of a merger on measures that would enhance competition. *See, e.g.,* Reply Comments of IMC Global Inc. at 2-4; Reply Comments of E.I. duPont de Nemours and Co. at 5; Reply Comments of Dow Chemical Co. at 12-14. EEI agrees with many parties that the Board should specifically seek to enhance intramodal competition. *See, e.g.*, Reply Comments of Dow at 6; Reply Comments of IMPACT, *supra.*

III.

THE RAILROADS' OPPOSITION TO MEANINGFUL SERVICE GUARANTEES IS MISGUIDED AND ILLOGICAL.

A. The Railroads Admit That Other Industries Are Required to Pay for Service Failures.

Most railroad parties filing Reply Comments admitted that financial penalties are imposed in some circumstances in other service industries.[6] However, with the apparent exception of UP, they seem to argue that other remedies are sufficient, and that the Board should not impose financial penalties on railroads for inadequate service for common carriage.[7] *Id.* They do so even though most concede that the shippers' concerns are legitimate; as CSX put it, for example, the shippers' "complaints reflect the unquestionably deep frustration of many rail shippers whose operations were impacted by the service problems encountered in the integration process in prior transactions." CSX Reply Comments at 40. With the exception of UP, the position of the other railroad parties seems to be based on the assertion, never proven, that "numerous remedies for service-related disputes are already available." AAR Reply Comments at 14. Nowhere does any railroad cite useful precedent on which a railroad customer using tariff service could rely to recover damages from a court for service inadequacies.

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[6] *E.g.*, AAR Reply Comments at 14-15; BNSF Reply Comments at 32-33 & n.35 (noting that electric utility tariffs provide for penalties for service failures under certain circumstances); CSX Reply Comments at 39-43; NS Reply Comments at 37-43; UP Reply Comments at 11. CP argues that penalties for service failures are not imposed on other service provides, Reply Comments at 12-13, but the Reply Comments of other railroads contradict CP's argument.

[7] Curiously, UP adopted AAR's Reply Comments (*id.* at 1), so UP's position is not entirely clear.

Lest there be any remaining concern on the Board's part about the propriety of imposing financial penalties on rail carriers for inadequate service, however, the Board should be aware that such penalties, in one form or another, are commonplace among service providers. For example, in *Southern Natural Gas Co.*, 59 F.E.R.C. ¶ 61,379 at 62,461 (1992), FERC imposed on a natural gas pipeline the obligation to provide a credit for monthly charges that the customer is otherwise required to pay, if service were interrupted due to the "fault" of the pipeline. However, as is typical, FERC also determined that "all parties bear the risk of *force majeure* events and in such cases no fees should be credited . . . ." *Id.* In some instances, "fault" may be found to exist due to only to gross negligence, as BNSF's Reply Comments contend,[8] whereas in the case of the natural gas pipelines, FERC seems to have imposed it whenever ordinary negligence occurs. Regardless of which standard is imposed, however, there seems to be no dispute that imposition of liability on the railroads for service failures is, at least in some instances, appropriate.[9] The railroads other than UP argue that the Board should not provide a remedy for service failures beyond those allegedly now available, but as we now show, the existing remedies are inadequate.

B. The Only Way to Improve Service Is to Increase the Railroads' Incentives for Providing Good Service by Imposing Financial Penalties on Them If They Fail.

In the absence of a contract provision guaranteeing adequate service or providing financial penalties if service is not adequate, shippers are left with statutory remedies for service failures.

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[8] BNSF Reply Comments at 33 n.35. BNSF's footnote 35 discusses the situation applicable under utility tariffs; generally, electricity sales in competitive service are governed by contract.

[9] Many parties agree with EEI that service guarantees are appropriate. *E.g.*, Reply Comments of the Wheat, Barley and Grain Commissions at 3; Reply Comments of Ohio Rail Development Commissions at 3-4.

Although railroads have a common carrier obligation to provide adequate service upon reasonable request,[10] there is little if any established precedent by the courts, the ICC, or the STB to determine the standard to which railroads are held or for compensating shippers for inadequate service. Such a lack of precedent creates a disincentive on the part of shippers to establish liability on the part of a railroad, for the first case is far more important to the railroad than the shipper. This is so because the precedent may bind the railroad in many cases, but bind the shipper in only one or a few. For that reason, the defendant railroad will either litigate if it is likely to prevail, or settle if it is not likely to prevail.[11]

In the circumstances, and to avoid the "unequal playing field" that litigation between railroads and shippers can present, the Board should require that railroads guarantee a level of service approximately equal to that provided prior to the merger.[12] Obviously, exceptional circumstances, such as *force majeure*, should not be the basis for liability, just as they would not have been without the merger.

Railroads have a duty to provide adequate service, as common carriers. (Of course, they also assume such duties under contracts, but the liability if any of a railroad under such a contract is

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[10] *Akron, Canton & Youngstown R.R. Co. v. United States*, 611 F.2d 1162 (6th Cir. 1979), *cert. denied*, 449 U.S. 830 (1980).

[11] To the best of EEI's knowledge, for example, Union Pacific settled all lawsuits seeking damages from it for its service meltdown in 1997-98.

[12] While EEI commends UP for its willingness to have the Board adopt a system for paying claims of shippers who experience service failures, EEI strongly disagrees with a standard that would require a railroad to pay a shipper only if service is below 50 percent of the level experienced prior to a merger for more than 60 days after notice is given. A shipper should be fully compensated for its damages incurred for service falling short of an adequate level. Service at only 50 percent of an historic benchmark is hardly adequate.

outside the Board's jurisdiction.) The violation of such a duty to provide "adequate service" upon "reasonable request" is subject to great uncertainty in litigation. The need for uniformity in rates led to creation of the ICC over a century ago, and the Board can and should provide the same uniformity now.[13]

BNSF admits that damages are "appropriate in some cases," Reply Comments at 33, but discusses factors that could constitute a legitimate excuse for railroads' failure to provide adequate service, such as giving priority to Defense Department traffic during wartime. *Id.* at 30. BNSF goes on to discuss other problems, such as the fall harvest, and hypothesizes a variety of circumstances which could constitute a defense to a charge that damages are due. *Id.* at 29-33.

EEI's response is that BNSF's arguments are largely about the exceptions, not the rules. Of course, *force majeure* events should not give rise to liability, whether they be due to war, natural disaster, or other traditional circumstances that create a valid defense to a claim.[14]

BNSF also argues that railroads should not be liable for service-related failures that are not caused by mergers. EEI's response is two-fold. First, neither the shipper nor the STB can know in every circumstance if a service failure is caused by a merger or other circumstance, but there should be a presumption that a decline in service after a merger creates a presumption that the decline was caused by the merger. Thus, if service has declined after a merger from historic levels established prior to a merger, that should constitute a *prima facie* case. The party with the knowledge of the

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[13] It is no answer to say "let Congress do so, if it wishes," for not only have the railroads opposed any legislation concerning economic regulation of them, but also the Board would have an obligation to articulate such a standard if a service dispute were in litigation before a court and the court referred the question to the Board under the doctrine of primary jurisdiction.

[14] A typical electric utility tariff provides for a defense to liability in such circumstances.

actual cause of the failure, the railroad, should then have the burden to demonstrate why the Board should not conclude that the cause was the merger. Railroad evidence of other causes, especially events constituting *force majeure*, will satisfy the railroad's burden of going forward and, absent rebuttal, prevent an order to pay a shipper damages.

Second, with respect to BNSF's argument that service failures could occur that are not merger-related, EEI agrees. But that is simply an argument for the adoption of rules for **all** circumstances, not just for service failures as a result of a merger. Railroads should be liable for service failures that cause damages to shippers, whether those failures are due to mergers or other causes. If the Board concludes that it cannot adopt such rules in this proceeding, but is determined to adopt service standards so as to hold railroads liable for their service failures resulting from mergers, then EEI would urge the Board to propose rules to establish service standards in all circumstances in another rulemaking proceeding, after adopting merger-related rules in this proceeding.[15]

One of the major reasons that the Board should establish service standards is that the Board is in a far better position to determine the level of service to which a railroad may be held than a court or Congress could do. These are matters that the expert agency exists to address, but which courts have been reluctant to address.[16] The railroad industry should much prefer to have the Board,

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[15] This is not intended to regulate service **levels**, as DOT infers (Reply Comments at 6), but rather to hold a railroad responsible for a significant deterioration in service compared to the level of service that a railroad provided pre-merger.

[16] In the *DeBruce Grain* case, for example, a United States District Court concluded that the STB should address not only the shipper's request for directed service but also a request for damages. That refutes arguments from railroads such as CSX that the Board is not an appropriate forum for such claims. *See* CSX Reply Comments at 39-41.

with its statutory responsibility to attempt to assist the railroads become revenue-adequate if they are "honest, economical, and efficient," 49 U.S.C. § 10704, set such standards, than to have courts do so on an *ad hoc* basis. For example, the Board should determine the base period for comparing post-merger service to pre-merger periods.

The railroads' arguments that such standards and service guarantees could be counterproductive[17] or even threaten a railroad's viability[18] miss the point. The point is that, if a railroad violates its statutory duty to a shipper, it has violated the law and must be held accountable for it. The duty of the Board to attempt to ensure a railroad's financial health is tempered by the requirement that railroads are entitled to such financial health only "under honest, economical, and efficient management." *Id.* By definition, the railroad would not be "efficient" if it were not providing adequate service within the meaning of the statute. So long as a railroad can continue to raise capital, retire its debt, cover its expenses, and pay reasonable dividends, it is earning "adequate revenues" within the meaning of 49 U.S.C. § 10704. EEI is unaware of any railroad that is not, in fact, meeting the statutory standard for "revenue adequacy."[19]

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[17] BNSF Reply Comments at 33.

[18] CP Reply Comments at 12.

[19] EEI's opposition to the Board's conclusion that assets may be written up from their book value to account for acquisition premiums is well-known to the Board. We will not belabor the point here, except to say that the statute does not contemplate asset write-ups. We also point out that CSX's objections to requiring that rail mergers enhance competition (objections dealt with elsewhere in these Rebuttal Comments) -- that there is "no reasoned basis ... where to stop" (Reply Comments at 15) -- is among the reasons that acquisition premiums should also not be passed through to shippers. By allowing the acquisition premiums that the Board has allowed in recent mergers, without identifying any basis for disapproval at **any** level, the Board has done the very thing that CSX warns against, with respect to competition: allowing asset write-ups with "no reasoned basis . . . where to stop." In any event, if the only reason that Class I railroads are not "revenue adequate" (continued...)

But what if such liability threatened the carrier's viability? First, no such circumstance has ever occurred. Union Pacific paid huge claims and did not become incapable of raising additional capital, let alone become non-viable, despite its horrendous service during the "meltdown," and now is "the only party to offer a concrete proposal fro service failures." UP Reply Comments at 11. CSX and Norfolk Southern have similarly been able to raise capital during their ongoing inadequate service following the Conrail "split," which is the statutory standard for viability.

Second, if hypothetically such liability did threaten a carrier's liability, the adoption of a standard by the Board, and a scheme to administer such claims, would, in fact, provide a central forum for evaluating the overall threat that such claims would pose, rather than in numerous courts or arbitration proceedings around the country.[20] It therefore follows that it is precisely because the Board was created **both** to protect shippers who do not receive adequate service **and** to attempt to assure that railroads earn adequate revenues that it would be appropriate for the Board to establish service standards, provide service guarantees, and administer such claims. In the absence of such standards, the Board will, in effect, adopt a standard that the railroads' shareholders, a majority of

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[19](...continued)
is due to such write-ups, EEI would regard that as proof of its point, rather than validation of the Board's standards. The Board is aware of a study by Professor Alfred E. Kahn and Dr. Jerome Hass which is critical of the STB's annual revenue adequacy determinations because of such write-ups, among other reasons, and EEI supports the conclusions of that study. DOT also urges the Board not to rely on its amended revenue adequacy determinations. DOT Reply Comments at 5.

[20] EEI is unaware of a single Class I railroad which was unable to raise capital, for at least the last 20 years if not longer. Even UP, at the height of its service crisis, went to Wall Street for capital, and its securities were oversubscribed. CSX and NS, similarly, have had no difficulty in raising capital during their service failures following their acquisition of Conrail. Moreover, the debt rates of such securities have been quite reasonable. It follows that the constant mantra of such carriers as BNSF, that any substantial change in railroad merger rules would threaten the railroad industry's ability to raise capital, is contrary to all recent history.

whom by definition must have voted to approve a merger (or who have purchased its stock since) and who chose to retain its existing management, should retain the money contributed by shippers through the rates paid by them (that is, after all, the main source of revenue for a railroad), rather than to compensate those shippers **with their own money** for the service failures of the shareholders' chosen management.

The only alternative is the present system, which leaves shippers with meritorious claims having no forum suited to hear them, unless they have clear service standards written into enforceable contracts. But to state the Board's choices is to make the choice, for if shippers could in all cases obtain such clauses in their contracts, they would not need the Board. The Board exists because shippers **cannot** in many instances defend themselves from railroad market power, leaving shippers with no recourse even in the event of demonstrably inferior service unless the Board provides that recourse.

IV.

THE BOARD'S STAFF'S RATE STUDY DOES NOT PROVE THAT COMPETITION EXISTS EVERYWHERE BETWEEN UP AND BNSF, OR THAT MERGERS HAVE NOT REDUCED COMPETITION.

BNSF argues that the Board Staff's recently released rate study "proves" that competition has not been lost between UP and BNSF.[21] It proves nothing of the kind.

First, no one argues that there is no competition at all between UP and BNSF. There is, in some places. But competition between UP and BNSF in some places proves nothing about whether UP and BNSF compete **everywhere**.

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[21] BNSF Reply Comments at 22-23.

Second, the study ignored the investments that shippers increasingly make that railroads used to make. Thus, the study ignores the issue of what a "rate" is. Shippers now routinely own railcars (most coal moves in shipper-owned railcars, for example), pay for maintenance of such railcars directly, and have invested in unloading equipment, "build-outs," "build-ins," other unloading facilities, and other real or personal property that used to be paid for by the rail carriers. Thus, the study compares "apples and oranges."[22]

Third, the study ignores the increases in other charges, such as demurrage charges. NS, for example, recently **quadrupled** demurrage charges, from $15 to $60 per day, along the Ohio River and elsewhere. Shippers must bear all rates **and charges** applicable to their transportation.

Fourth, the real issue is whether mergers have reduced competition in specific locations. Averages prove nothing. EEI is disappointed that the Board did not even require UP and BNSF to answer eight specific questions EEI posed, with respect to SP's Central Corridor from Kansas City, Missouri to Oakland, California, in Finance Docket No. 32760 (Sub-No. 21). A specific focus on evidence about the SP Central Corridor or, say, Houston, would identify whether the Staff's study masks a loss of competition in certain places.

Fifth, rail rates have been declining since the early 1900s, just as have rates for other network industries, such as telephone rates. For some reason, the Board's Staff study starts in 1984, which coincidentally is the year after UP's predecessor received access to the Powder River Basin in

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[22] The study is of limited value in another respect, too. It defines rate as the revenue per ton-mile, but shippers do not pay in such terms. They generally pay rates on a per-ton basis. The difference is substantial, because, as the Board knows, the length of haul for the average coal movement, as well as for other commodities, has increased substantially over the last 20 years. The trend has resulted from the switch from eastern to western coal due to the Clean Air Act, the abandonment of railroad branch lines, and the increased concentration on long-haul traffic, among other factors.

Wyoming. There is no question that granting access to the PRB to a second railroad has had the effect of lowering coal rates substantially. But that does not disprove the general trend, nor does it prove that there is competition between UP and BNSF elsewhere. If the Board's Staff study is to be perceived as objective, it should be redone, with the study starting from the early 1900s, so that the recent trend could be compared to the long-term trend, to see if the years that the Board studied are in any way different from the long-term trend, while defining a "rate" so as to compare "apples to apples." The long-term reduction in rail rates that began in the early 1900s was clearly not due to rail mergers, but to a wide variety of factors, so using the much earlier starting point would allow observers to determine if the ICC's and STB's more recent policies have altered the long-term trend.

Therefore, merely documenting the historical trend in rail rates, even if they had been properly measured, proves very little about the state of intramodal competition. The best evidence of recent trends in rail rates is probably from NIT League, whose Reply Comments contain its most recent survey of its members, showing rate increases of varying amounts on the largest Class I railroads. When those increases are coupled with the increases in such things as demurrage charges, which have been quite substantial, and with the continued shift to the shipper of many functions that used to be borne by the railroad, the picture becomes clear: the total transportation costs to shippers are increasing, not decreasing (as the Board's Staff study purports to show). Rather than rely on a study that was never subject to analysis, rebuttal, or cross-examination, the Board would better rely on the evidence submitted by the shippers themselves, through NIT League.

V.

THE BOARD SHOULD APPROVE VOTING TRUSTS ONLY IF THEY ARE CONSISTENT WITH THE PUBLIC INTEREST.

CN[23] and the Port Authority of New York and New Jersey[24] argue against a "public interest" test for Board approval of voting trusts at the outset of a merger proceeding. EEI continues to maintain that the Board should only approve a voting trust if it is in the "public interest," and is confident that the Board can apply that test.

First, in retrospect it is clear that certain EEI members were right that the debt burdens NS and CSX assumed in the *Conrail* proceeding have adversely impacted their financial health, and perhaps their service. Second, now that it is clear that railroads should not take on such debt levels above the value of the railroads as established by the market before a bidding war begins without serious consideration whether the debt levels will be too high, the Board must consider that issue before, not after, such debt is assumed. It is too late, as a practical matter, to reverse course once the voting trust is approved and the debt assumed. Third, the Board can evaluate such matters at the threshold of a proceeding as well as it can later. The debt loads will be essentially the same. And, finally, EEI's overriding concern was that the Board itself, not its Staff, make such judgments.

CN and the Port Authority contend that it is impossible to make such judgments at the threshold, but courts do such things all the time in considering whether to grant an injunction or stay at the outset of litigation, based on probabilities. The Board can do the same, especially where the levels of debt in relation to the value of the assets at issue are as clear at the outset as at the end.

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[23] CN Reply Comments at 19-20.

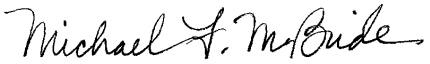
[24] PANYNJ Reply Comments at 4.

Otherwise, the public interest could be adversely affected without the Board itself ever directly assuming responsibility for the adverse impact. It is the Board, not its Staff, which is charged by the President and Congress with the responsibility to determine the public interest.

Conclusion

The Board should adopt the proposed changes advocated by EEI in its Opening and Reply Comments, and in these Rebuttal Comments, and not adopt the proposals of the railroad parties to which EEI has taken issue.

Respectfully submitted,



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January 11, 2001

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